JUN 11 2001 (13)

Supreme Court, U.S.
FILED
JUN 11 200
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No. 00-730

In The
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.
Petitioner,

v.

NORMAN MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether, using strict scrutiny analysis, a statutory scheme providing financial incentives for federal contractors to hire women- and specified minority-owned subcon-tractors based on a race-based and gender-based presumption of social disadvantage violates Petitioner's right to the equal protection of the laws.

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the self-evident truth of equality articulated in the Declaration of Independence and now codified in the Constitution of the United States guarantees to every individual the right to the equal protection of the law, regardless of his or her race.

The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, the Institute and its affiliated scholars have published a number of books and monographs about the Founders' views on equality and on the unconstitutionality of laws which categorize Americans on the basis of their race, including Harry V. Jaffa, Equality and Liberty: Theory and Practice in American Politics (The Claremont Institute 1999) (1965), Thomas G. West, Vindicating The Founders: Race, Sex, Class and Justice in The Origins of America (1997), and Edward J. Erler, The Future of Civil Rights: Affirmative Action Redivivus, 11 Notre Dame J. L. Ethics & Pub. Pol'y 15 (1997).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this that involve issues of constitutional significance going to the heart

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

of the founding principles of this nation. The Center has previously participated as *amicus curiae* in this Court in such important cases as *Dale* v. *Boy Scouts of America*, 530 U.S. 640 (2000), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook Cty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

SUMMARY OF ARGUMENT

The fundamental premise upon which this nation declared its independence in 1776 was the immutable, self-evident truth that "all men are created equal." Although our nation's founders were forced to compromise with the inherited evil of slavery in order to forge a national union, it was their most fervent prayer that by so doing, slavery would be placed in the course of ultimate extinction and the stain on our national commitment to the principle of equality would be forever removed.[2]

Our nation made great strides toward fulfilling its commitment to equality in the early years of its existence. Every one of the northern states abolished slavery, and the national Congress closed the slave trade in 1808, as soon as the Constitution permitted. But over the course of the next two decades, a fundamental transition took place in southern thought that delayed and even threatened to derail the march toward slavery's extinction. Largely drawn from the mind of John C. Calhoun and motivated by financial considerations, leading southerners began to contend that race-based slavery was a "positive good" rather than just a temporary, necessary

[2] *See generally* West, VINDICATING THE FOUNDERS; *see also* Thaddeus Stevens, Speech before the House of Representatives urging passage of the Fourteenth Amendment, Cong. Globe, 39th Cong. 2459 (May 8, 1866) ("It cannot be denied that this terrible struggle sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now").

evil.[3] And in what is surely one of its darkest moments, this Court in 1856 repudiated the principles of the Declaration of Independence, holding in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856), that the equality principle articulated by Thomas Jefferson 80 years earlier had never been intended to apply to *all* human beings. Chief Justice Taney, on behalf of the Court, erroneously contended that "neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were . . . intended to be included in the general words used in that memorable instrument." 60 U.S. at 407. "That unfortunate race" was regarded as "so far inferior," Taney wrote, "that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." *Id.*

Taney's strange notion of justice was not shared by our nation's founders,[4] and happily it was not shared by Abraham Lincoln, who rose to the challenge presented by the Taney Court and, though unfortunately at great cost, restored our nation's commitment to what Lincoln himself termed "our ancient faith," that principle of equality shared by all human beings at all times, that enabled the most recent immigrant to be on a par with the most revered daughter of the

[3] *See, e.g.*, John C. Calhoun, Speech on the Reception of Abolition Petitions, Feb. 6, 1837, *reprinted in* Ross M. Lence, ed., Union and Liberty: The Political Philosophy of John C. Calhoun 474 (1992); George Fitzhugh, Cannibals All: Or, Slaves Without Masters 19 (C. Vann Woodward ed., 1960) (1857) ("The negro slaves of the South are the happiest, and, in some sense, the freest people in the world. The children and the aged and infirm work not at all, and yet have all the comforts and necessaries of life provided for them. They enjoy liberty, because they are oppressed neither by care nor labor").

[4] Thomas Jefferson, for example, wrote with regard to slavery: "I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever," and that the "Almighty has no attribute which can take side with us in such a contest [between slaves and masters]." T. Jefferson, "Notes on the State of Virginia, Query XVIII," *reprinted in* Jefferson: Writings 289 (M. Peterson, ed. 1984).

revolution. *See, e.g.,* A. Lincoln, Speech at Chicago, Illinois (July 10, 1858), *reprinted in* R. P. Basler ed., 3 Collected Works of Abraham Lincoln 484, 499 (1953) (describing the Declaration's statement of equality as the "father of all moral principle," applicable as much to recent immigrants as to descendants of the framers themselves). Nor was Taney's notion shared by Martin Luther King Jr., who called the principle of equality articulated in the Declaration of Independence a "promissory note to which every American was to fall heir." M. L. King, Jr., "I Have A Dream," (Aug. 28, 1963), *reprinted in* A. Meyer et al., eds., Black Protest Thought in the Twentieth Century 346, 347 (2d ed. 1971). King, like Lincoln and Jefferson before him, knew that this, and not Taney's view, was the "true meaning" of the Declaration's creed. *Id.* As Dr. King recognized, it is a principle that requires individuals to be judged on their own merits, "not...by the color of their skin but by the content of their character." *Id.*

The time for government to cease treating individuals on the basis of their skin color rather than their merit is long overdue. As this Court held in *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989), any discrimination on the basis of race must cease, except (perhaps) as a remedy for government's own prior or continuing discrimination on the basis of race. "The time for mere 'deliberate speed' [to fully enforce this principle] has run out." *Griffin* v. *County Sch. Bd.*, 377 U.S. 430, 234 (1968); *see also Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *cf. Brown v. Board of Ed.*, 349 U.S. 294, 301 (1955) ("*Brown II*") (ordering that assignment of pupils to schools based on race be ended "with all deliberate speed").

It is also time to realize that the principles of the Declaration will likewise not countenance racial discrimination that purports to remedy for past wrongs against individuals of one race by conferring benefits upon others who happen to share the same skin color, at the expense of those who do not. As Dr. King also noted that August day from the steps

of the Lincoln Memorial, "In the process of gaining our rightful place [as beneficiaries of the Declaration's promise of equality,] we must not be guilty of wrongful deeds." King, "I have a Dream," *supra*, at 5.

Five years after this Court's original ruling in this case and more than 10 years after Petitioner was denied a contract merely because of the color of his skin, the Tenth Circuit nominally applied this Court's almost-always-fatal strict scrutiny analysis[5] to torture out the conclusion that the racial presumptions at issue here are nevertheless constitutional, without any evidence of prior discrimination by government or any evidence that the particular beneficiaries of the race-based program were themselves constitutionally entitled to a race-based remedy for past harms suffered. *Adarand Constructors v. Slater,* 228 F.3d. 1147 (10th Cir. 2000). In short, "[t]here has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" of the Petitioner in this case. *Green*, 391 U.S. at 229. It is now for this Court to say, as it said in *Green*, this recalcitrance is unacceptable and that legal categorization by race must end "*now*." *Id.* at 439.

ARGUMENT

I. The Constitution of The United States Is Colorblind.

A. The Founders intended the law to apply equally to all Americans.

The fundamental creed upon which this nation was founded is that "all men are created equal." DECLARATION OF INDEPEN-DENCE ¶2. As Abraham Lincoln would later note, the equality principle articulated in the Declaration is a "great truth, applicable to all men at all times." *Letter from Abraham Lincoln to H.L. Pierce* (Apr. 6, 1859), *reprinted in* 3 Collected Works 374, 376. The principle had previously

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[5] This Court recognized in *Adarand I* that strict scrutiny was not necessarily fatal in fact, 515 U.S. at 237, but the fact remains that it poses a very high burden on government, one that is rarely overcome.

been articulated by John Locke, whose political theory greatly influenced many of our nation's founders: "*All Men by Nature are equal [and have an] equal Right...to [their] Natural Freedom* without being subjected to the Will or Authority of any other Man." John Locke, Two Treatises of Civil Government 346 (P. Laslett, ed., 1963) (1689) (emphasis in original). "All men" meant *all human beings*—men as well as women, black as well as white. *See, e.g.*, James Otis, Rights of the British Colonies Asserted and Proved ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), *reprinted in* B. Bailyn, ed., Pamphlets of the American Revolution 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?").

These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), *reprinted in* P. Kurland & R. Lerner, eds., 1 The Founders' Constitu-tion 6 (1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), *reprinted in* 1 The Founders' Constitution 11. Even those of the founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." *Letter from Thomas Jefferson to Roger C. Weightman* (June 24, 1826), *reprinted in* M. Petterson, ed., Jefferson: Writings 1516, 1517 (1984).

This was true, according to Jefferson, even if people were not of equal capabilities. "[W]hatever be their degree of talent it is no measure of their rights," wrote Jefferson shortly before the end of his second term as President. "Because Sir Isaac Newton was superior to others in understanding, he

was not therefore lord of the person or property of others." *Letter from Thomas Jefferson to Henri Gregoire* (Feb. 25, 1809), *reprinted in id.* at 1202.

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result.[6] Indeed, James Madison even described the "protection of different and *unequal* faculties" as "the first object of government." The Federalist No. 10, at 78 (Rossiter ed. 1961) (1788) (emphasis added). Alexander Hamilton echoed this understanding of equality, one of equal rights and opportunities despite inequalities of strengths and talents. *See* The Federalist No. 36, at 217 ("There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their *merit*, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all*" (emphasis added)); *see also* J. Locke, Two Treatises, at 346 ("Age or virtue may give men a just precedency. Excellency of parts and merit may place others above the common level ...yet all this consists with...the equality I there spoke").

B. The Founders put slavery and other such discriminatory practices in the course of ultimate extinction.

Yet while equality has always been an American ideal, it is also an ideal with which America has long struggled. Slavery, of course, was the great challenge to the principle of equality. James Madison complained at the Constitutional Convention that "[w]e have seen the mere distinction of col-

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[6] The distinction can probably be traced to President Lyndon Johnson's speech at Howard University on June 4, 1965: "[I]t is not enough just to open the gates of opportunity....We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights, in 2 Public Papers of the Presidents 1965 635, 636 (1966).

our made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." M. Farrand, 1 Records of the Federal Convention of 1787, 135 (1911). Benjamin Franklin called slavery "an atrocious debasement of human nature." Franklin, Address to the Public from the Pennsylvania Society for Promoting the Abolition of Slavery, *reprinted in* J. A. Leo Lemay, ed., Benjamin Franklin: Writings 1154 (1987); *see also* West, Vindicating The Founders, at 2-5, 7-10.

The Founders understood that slavery severely tarnished the nation's commitment to the principle of equality, but they were forced to make what they thought would be a temporary compromise with the political power of slave owners in order to secure a national union that could withstand threats from abroad (and hence keep alive the promise of equality at home). They thus inserted into the Constitution specific and (they hoped) temporary protections for slavery. *See* U.S. Const. Art. I, § 2, cl. 3 (three fifths clause); Art. IV, § 2, cl. 3 (fugitive slave clause); *see also* Art. I, § 9, cl. 1 (permitting Congress to prohibit the slave trade after twenty years). Still, the Founders believed they had placed slavery in the "course of ultimate extinction" by establishing the principle of equality in our founding charter. That is why Chief Justice Taney found it necessary to claim that blacks were not "intended to be included in the general words used in that memorable instrument" in order to justify his ruling perpetuating slavery. *Dred Scott,* 60 U.S. at 407.

Earlier courts, however, had recognized what to the Founders was self-evident: slavery was "contrary to natural right and the plain principles of justice." *Commonwealth* v. *Aves*, 35 Mass. 193, 210 (1836). Addressing the equality provision in the Massachusetts Constitution of 1780's Declaration of Rights described above, for example, the Supreme Judicial Court of Massachusetts stated: "It would be difficult to select words more precisely adapted to the abolition of negro slavery." *Id.* In *Jackson* v. *Bulloch,* 12 Conn. 38, 42-43 (1837), the Connecticut Supreme Court held slavery

unconstitutional because the State constitution's "bill of rights, in its 1st section, declares, that all men, when they form a social compact, are equal in rights." Even the Supreme Court of Mississippi admitted in 1818 that slavery was "condemned by reason and the laws of nature." *Harry* v. *Decker & Hopkins*, 1 Miss. 36, 42 (1818). Abraham Lincoln's Emancipation Proclamation in 1863 was thus not a revolution in American principle, but a fulfillment of the principle to which the nation had committed itself four score and seven years earlier, in the Declaration of Independence.

C. After the Civil War, America's dedication to equal treatment was emphasized again in the Fourteenth Amendment.

The end of slavery after the Civil War brought with it new racial challenges, however, such as Black Codes and Jim Crow laws. Racist whites attempted to keep newly freed slaves from voting, earning a living, or owning property. But the paternalism of "benign" whites limited the freedom of blacks in many ways, too. The former slave Frederick Douglass addressed this problem when he wrote that "in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply *justice*." F. Douglass, What The Black Man Wants (Jan. 26, 1865), *reprinted in* Blassingame & McKivigan, eds., 4 Frederick Douglass Papers 59, 68-69 (1991) (emphasis in original). Douglas continued:

> Everybody has asked the question ... "What shall we do with the Negro?" Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us!...[I]f the Negro can not stand on his own two legs, let him fall also! All I ask is, give him a chance to stand on his own legs! Let him alone! ... If you will only untie his hands, and give him a chance, I think he will live.

Id. In other words, Douglass understood "benign" race classifications to be just as pernicious and harmful even to their

supposed beneficiaries as were other racial classifications.

This Court echoed the sentiment in *Adarand I*: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." 515 U.S. at 226 (*quoting Croson*, 488 U.S. at 493)); *see also id.* ("it may not always be clear that a so-called preference is in fact benign" (*quoting Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.))); *id.*, at 239 (Scalia, J., concurring in part and concurring in the judgment) ("To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred"); *id.*, at 240 (Thomas, J., concurring in part and concurring in the judgment) ("There can be no doubt that the paternalism that appears to lie at the heart of [the federal set-aside program] is at war with the principle of inherent equality that underlies and infuses our Constitution" (*citing* Declaration of Independence, ¶ 2)).[7]

[7] *See also Croson*, 488 U.S. at 516-17 (Stevens, J., concurring in part and concurring in judgment) ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"); *Metro Broadcasting, Inc.* v. *F.C.C.*, 497 U.S. 547, 609-10 (1990) (O'Connor, J., dissenting) ("'Benign' racial classification is a contradiction in terms"); *Fullilove* v. *Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) ("a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when foster-ed by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor"); *Bakke*, 438 U.S. at 295 (opinion of Powell, J.) (noting that the four justices who argued for lower scrutiny offered "no principle for deciding whether preferential classifycations reflect a benign remedial purpose or a malevolent stigmatic classification").

It was precisely to eradicate *all* racial distinctions, invidious as well as so-called benign, that the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution. The primary purpose of these Amendments was to place the newly freed slaves on an equal footing with whites, but the language adopted is not limited to such a purpose. It is instead designed to protect all Americans *equally*. The Civil Rights Act of 1866 declared that "citizens, *of every race and color*...shall have...full and equal benefit of all laws...and shall be subject to like punishment, pains and penalties, and to none other." Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §1981) (emphasis added). After President Andrew Johnson vetoed the Act, Senator Lyman Trumbull denounced him, saying that "The bill...simply declares that in civil rights there shall be equality among *all classes of citizens* and that all alike shall be subject to the same punishment....[A]ll that is required is that, in this respect, its laws shall be impartial." Cong. Globe 39th Cong. 1st Sess. 1760 (1866) (Sen. Trumbull) (emphasis added).

Congress overrode Johnson's veto, and passed the Fourteenth Amendment to guarantee the Act's constitutionality. That Amendment provides that "no State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1, cl. 4. Senator Sherman, one of the principal authors of the Amendment, hoped that "the common sense, the love of fair play, and the spirit of liberty which animate the great body of the people of the United States will cause all those distinctions founded on the old law of slavery to melt away under the progress of our civilization." Cong. Globe 42nd Cong. 2d Sess. 845 (1872). Senator Morton responded that

> the word "protection"...means substantially that no person shall be deprived by a State of the equal

> benefit of the laws...not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law.... [I]n other words, the States cannot create inequalities by their own legislation.... [The Amendment] was intended to strike at all class legislation, to provide that laws must be general in their effects.

Cong. Globe 42d Cong. 2d Sess. 846-847 (1872). The Civil War Amendments were meant, in other words, to "remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to *all citizens of every race and color* ... those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens." *Civil Rights Cases*, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting) (emphasis added).

The principle of equal protection was "[p]urchased at the price of immeasurable human suffering," *Adarand I*, 515 U.S. at 240 (Thomas, J., concurring), but in 1896, this Court again dealt a blow to that principle when, in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), it upheld laws once again classifying Americans by race. The infamous "separate but equal" doctrine was propounded by this Court in *Plessy* over a lone dissent by Justice John Marshall Harlan, who insisted that

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559 (Harlan, J., dissenting). Fifty-eight years later, in *Brown v. Board of Ed.*, 347 U.S. 483 (1954), this Court repudiated *Plessy*'s separate but equal doctrine in the field of

education, and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" King, "I Have A Dream," *reprinted in* A. Meyer et al., eds., Black Protest Thought in the Twentieth Century 346, 347 (2d ed. 1971).

II. Laws Classifying Americans by Race Are Incompatible with American Institutions and Practices.

A. The Constitution and laws of the United States are meant to treat each individual as an individual, not as a member of a caste.

Laws which distinguish between people on the basis of race are incompatible with these foundational principles because they judge people not as individuals, but as fungible members of a racial class. As Justice Thomas noted in *Missouri* v. *Jenkins*, "[a]t the heart of ... the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups. 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring).

The Constitution's text makes clear that the rights it was designed to protect are individual rights, not group rights. *See* U.S. Const. amend. V ("No *Person* shall be ... deprived of life, liberty or property, without due process of law") (emphasis added); U.S. Const. amend. XIV ("No state shall...deny to any *person* within its jurisdiction the equal protection of the laws") (emphasis added); *see also Bakke*, 438 U.S. at 289-90 (Powell, J., for the Court) ("The guarantees of the Fourteenth Amendment extend to all persons.... It is settled beyond question that the 'rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights....'" (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948))); *see also McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151, 161-162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938); *Oyama* v.

California, 332 U.S. 633 (1948). Indeed, this Court recognized that the Constitutional protection is afforded to individuals, not groups, even under the ignominious separate-but-equal regime approved in *Plessy*. *See McCabe*, 235 U.S. at 161-62 ("It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded").

This understanding of equality as an individual rather than a group right dates back to the founding. "A nation," wrote John Dickenson, "is but an assembly of *individuals* ... [and a] confederation should promote the happiness of *individuals*, or it does not answer the intended purpose." Fabius [John Dickenson], Observations on the Constitution Proposed by the Federal Convention III (April 17, 1788), *reprinted in* B. Bailyn, ed., 2 The Debate on the Constitution 409, 410 (1993) (emphasis in original). That is why "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). "What is [equal protection]," asked this Court in *Strauder* v. *West Virginia*, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States." 100 U.S. 303, 307 (1879).

B. The end of "Separate But Equal" re-dedicated this country to equal justice under the law.

This Court finally held in *Brown* v. *Education* and a series of *per curiam* decisions decided shortly thereafter that the separate-but-equal doctrine articulated in *Plessy* was incompatible with the Fourteenth Amendment's guarantee of equal protection. At the same time, it also held in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), that the Due Process Clause of

the Fifth Amendment afforded individuals the same equal protection from the federal government that the Fourteenth Amendment guaranteed from state governments. "Classifications based solely upon race," the Court held, "are contrary to our traditions and hence constitutionally suspect." *Id.*, at 499; *see also Adarand I*, 515 U.S. at 240 (Thomas, J., concurring) (referring to "the principle of inherent equality that underlies and infuses our Constitution").

This Court thus expressed this nation's recommitment to the principles that Justice Harlan had articulated in dissent in *Plessy* and in *The Civil Rights Cases*:

> The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination....To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatver now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

109 U.S. at 62 (Harlan, J., dissenting). Indeed, as Justice Stevens has previously noted, "The self-evident proposition enshrined in the Declaration—the proposition that all men are created equal—is not merely an aspect of social policy that judges are free to accept or reject; it is a matter of principle that is so firmly grounded in the 'traditions of our people' that it is properly viewed as a component of the liberty protected by the Fifth Amendment." John Paul Stevens, The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 23-24 (Winter, 1992). Quite simply, "the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand I*, 515 U.S. at 240 (Thomas, J., concurring).

III. "Benign" Classifications Violate Principles of Equal Protection Every Bit As Much As "Invidious" Classifications.

Since *Brown*, the rightness of equal protection has come to be widely accepted. *See, e.g., Freeman* v. *Pitts,* 503 U.S. 467 (1993). Yet government racial classifications remain in many places. These programs, often called collectively "affirmative action," are said to satisfy the Constitutional requirement of equal protection because they establish "benign" racial classifications. *See Adarand I,* 515 U.S. at 245 (Stevens, J., dissenting). In fact, they violate equal protection, because they violate the fundamental principle that the protection afforded by the equal protection clause is afforded to individuals, not groups. Such programs punish those not included in the favored class, merely because of race, and they place an unconstitutional badge of inferiority on the alleged "beneficiaries" of such classifications.

A. This racial classification punishes innocent Americans who are not included among the preferred class.

So-called "benign" racial classifications violate the principle of equality because they punish those whose race is not favored by the law. Those disfavored by the classification scheme, solely because of their race, are essentially being punished for the transgressions of their ancestors who owned slaves or discriminated against minorities in centuries past—without even evidence that their *actual* ancestors transgressed. As the Circuit Court in this case admitted, Randy Pech, owner of Adarand Constructors, is being forced to pay for the actions of those who share his racial ancestry. 228 F.3d, at 1183. Not only is this problematic under the Equal Protection clause, but it smacks of an unconstitutional Bill of Attainder as well. *See* U.S. Const. Art. I, § 9; *see also* Federalist No.44, at 282 (J. Madison) (noting that Bills of Attainder were "contrary to the first principles of the social compact and to every principle of sound legislation"). Justice Douglas had it right in *DeFunis* v. *Odegaard*:

> There is no constitutional right for any race to be preferred.... A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

416 U.S. 312, 337 (1974) (Douglas, J., dissenting); *see also Bakke*, 438 U.S. at 298 (1978) ("there is a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making"); *id.*, at 290 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

B. This racial classification constitutes a badge of inferiority because it presumes that minority group members are incapable of competing in the marketplace.

"Benign" racial classifications in the law therefore punish innocent individuals, yet that is not the only reason such classifications are constitutionally problematic. As this Court noted in *Anderson* v. *Martin*, "[t]he vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice." 375 U.S. 399, 402 (1964); *see also Jenkins*, 515 U.S. at 122 (Thomas, J., concurring) ("The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color").

"Benign" racial classifications such as the race-based presumption at issue here amount to a legislative declaration that minority groups are incapable of competing in the marketplace and must be given special assistance. The result is a growing tendency to presume that those minority group members who do succeed were unable to compete fairly, but instead were beneficiaries of government "help." "By formally drawing racial and ethnic lines, affirmative action

invites judgments about the abilities and achievements of those who are members of the targeted groups. One persistent judgment is that those who received a benefit through affirmative action could not have secured it on their own." T. Eastland, Ending Affirmative Action: The Case for Colorblind Justice 8-9 (2d ed. 1997). "Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor." *Fullilove,* 448 U.S. at 545 (Stevens, J., dissenting). Racial paternalism hurts minority group members by not teaching them to compete fairly in the marketplace, and by "provok[ing] resentment among those who believe that they have been wronged by the government's use of race." *Adarand I,* 515 U.S. at 241 (Thomas, J., concurring).

These paternalistic programs "constitute badges of slavery and servitude." *Civil Rights Cases,* 109 U.S. at 36 (1882) (Harlan, J., dissenting). They are akin to legislation that once blocked women from entering a variety of professions, which was "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect." Ruth Bader Ginsburg, Constitutional Adjudication in the United States As A Means of Advancing The Equal Statute of Men And Women Under The Law, 26 Hofstra L. Rev. 263, 269 (Winter, 1997). Such legislation was "ostensibly to shield or favor the sex regarded as fairer but weaker, and dependent-prone," *id.*, but was in fact "premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them." *Id.*, at 270.

In exactly the same way, racial set-asides are ostensibly designed to shield minority group members, but in fact are premised on the notion that they are incapable of competing

without a big brother—a white big brother—to guide them.[8] The government may defend these programs by claiming that they are "entirely rational," because minorities as a class are more in need of financial assistance than are whites, but under strict scrutiny, laws reflecting the situation of the average minority member are not good enough. *Cf. id.*, at 268. Indeed, this court explicitly rejected the same statistical arguments proferred by the government and accepted by the Tenth Circuit below when they were put forward in Justice Marshall's dissenting opinion in *Croson. See* 488 U.S. at 504-506. Laws act upon individuals, and the principle of equal protection does not permit the government to attach a badge of inferiority to racial groups merely to achieve some statistical race balance. *See Adarand I,* 515 U.S. at 241 (Thomas, J., concurring).

IV. This Racial Set-Aside Program Does Not Withstand Strict Srutiny.

A. Government has no compelling interest in dividing Americans by race.

Recognizing that there is virtually no legitimate reason for classifying individuals according to race, this Court subjects such classifications to the strictest of scrutiny. *Adarand I,* 515 U.S. at 227; *see also id.*, at 236 (agreeing with Justice Stevens dissenting opinion in *Fullilove* contending for strict scrutiny "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic"). Apart from remedying past or ongoing discrimination by government itself (and even then only when the classification is narrowly tailored to provide the remedy only to those who were actually discriminated against), Govern-

[8] Unfortunately, the results of such "benign" discrimination have often been just as bad for their alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.,* T. Sowell, The Economics and Politics of Race 200 (1983) (illustrating "counterproductive trends" caused by "beneficial" discrimination.)

ment can have no legitimate—let alone "compelling"—interest in creating racial categories among citizens, regardless of whether the categorizations are classified as "benign" or "malign." As Justice Harlan noted in his *Plessy* dissent, "the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.... I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved." 163 U.S. at 554-555 (Harlan, J., dissenting).[9]

A variety of alleged justifications for racial classifications have been proffered to, and rejected by, this Court. *See* E. Chemerinsky, Constitutional Law: Principles And Policies 590-593 (1997). The so-called "diversity rationale" suggested by Justice Powell's separate opinion in *Bakke*, 438 U.S. at 314, was rejected in *Adarand I*, 515 U.S. at 226. *See also Hopwood* v. *Texas*, 78 F.3d 932, 944, *cert. denied*, 518 U.S. 1033 (1996) ("Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case....

[9] *See also Buchanan* v. *Warley*, 245 U.S. 60, 73-74 (1917) ("the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution"); *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) ("'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is...this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution'" (quoting *Buchanan*, 245 U.S. at 81)); *Watson v. Memphis*, 373 U.S. 526, 536 (1963) (asserted purpose of preventing racial conflict is insufficient to overcome equal protection guaranties); *Palmore v. Sidoti*, 466 U.S. 249, 434 (1984) ("effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody"); *Adarand I*, 515 U.S. at 239 (Scalia, J., concurring in part) ("government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.")

[T]he classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection."); *Johnson* v. *Board of Regents of the Univ. Sys. of Georgia*, 106 F. Supp. 2d 1362, 1368-69 (S.D. Ga. 2000). The justification of racial categories in order to "provide role models" was likewise rejected in *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267, 275-276 (1986). The suggestion that racial classifications may be used to remedy general societal discrimination has also been rejected. *Id.*, at 274.

B. The statistics relied upon by the Circuit Court to demonstrate a "compelling interest" are irrelevant and misleading.

The only interest this Court has accepted as justifying racial classifications is to remedy *actual past discrimination* by the government agency involved. *Croson*, 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *Adarand I*, 515 U.S. at 237.

The Circuit Court went to great lengths to demonstrate that there is an evidentiary basis for Congress' conclusion that minority-owned contractors have been victims of actual discrimination. *See, e.g.*, 228 F.3d, at 1169-1170. Yet the evidence it accepted did not demonstrate either that Gonzalez Contracting—which did receive the contract that Adarand was denied on the basis of race—had ever suffered from discrimination, or that the government had ever acted to discriminate against minority contractors in this field. Instead, the Circuit Court held that the evidence showed "that informal, racially exclusionary business networks dominate the subcontracting construction industry." *Id.*, at 1171; *see also id.*, at 1169 ("evidence demonstrates that prime contractors [belong to] 'old boy' networks"). In other words, even accepting the Tenth Circuit's characterization, *see infra*, the evidence showed at most only general societal

discrimination, which is not amenable to remedy by racially discriminatory legislation. *Wygant*, 476 U.S. at 274.

Secondly, the evidence the Circuit Court relied upon was largely compiled by statistical comparisons, which are irrelevant and highly misleading in this area of the law.[10] In fact, the assumption underlying the use of such statistics—that any disparity must be due to discrimination—is based on a "results" understanding of equality not compatible with the Founder's conception of equality (or the 14th Amendment's) and not grounded in reality. Even assuming perfect non-discrimination, for example, it is "completely unrealistic" to assume, as Justice O'Connor noted in *Croson*, "that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (citing *Sheet Metal Workers* v. *E.E.O.C.*, 478 U.S. 421, 494 (1986)); *see also* T. Sowell, The Vision of the Anointed 37 (1995) (illustrating that "inferences [of discrimination] cannot be made *either* way from the bare fact of statistical differences" (emphasis in original)); Eastland, *supra* at 171-172 (same). As a result, this Court has rejected the suggestion that the government may attempt to equalize the percentages of racial populations in the general public and in a particular market. *See Croson*, 488 U.S. at 507.

Moreover, even if evidence of statistical disparity was sufficient to show actual discrimination by government, the statistical "evidence" the Circuit Court relied upon, precisely like the evidence this Court rejected in *Croson*, did "little to define the scope of any injury to minority contractors in [Denver] or the necessary remedy. *Croson*, 488 U.S. at 505.

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[10] Much of the statistical evidence the Circuit Court relied upon was also flawed. The Brimmer and Marshall study, for example, relied upon by the Court of Appeals below, 228 F.3d at 1172, has been declared "insufficient to establish a strong basis in evidence" for racial set-asides because it suffered from "flaws in the analysis that are insurmountable." *Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1368 (N.D. Ga. 1999), *aff'd* 218 F.3d 1267 (11th Cir. 2000).

Indeed, as in *Croson*, "[t]he factors relied upon by the [Circuit] could justify a preference of any size or duration." *Id.* Far from getting beyond race, such a presumption guarantees race-based decision-making in perpetuity. This simply cannot be squared with the command of equal protection; the government certainly has no "compelling interest" in fostering such a system of racial spoils.

C. This race-based program is not narrowly tailored.

1. The presumption of disadvantage for minority members is over-inclusive and under-inclusive.

Although, as the Circuit Court noted, the regulatory presumption of disadvantage for a particular race has been changed, 228 F.3d at 1185, the new regulations remain unconstitutional. 13 C.F.R. § 124.104(b)(1) still applies to general social discrimination ("social disadvantage") rather than any particularized examples of racial discrimination from an identifiable governmental source. And the presumption of disadvantage has not been wholly eliminated. The statute itself still contains a badge of inferiority: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." 15 U.S.C. § 637 (3)(C)(ii). No change in the *regulation* can effectuate a change in this *statute*.

Moreover, the regulation itself also retains its discriminatory nature. 49 CFR 26.67(a) (2001) still requires the government to "presume that...women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities...are socially and economically disadvantaged individuals." Thus, the Tenth Circuit's claim that new regulations have "eliminated...offending 1996 practices," 228 F.3d at 1185, is disingenuous at best, especially since 49 CFR 26.61 (c) (2001) still holds that minority group members "*do not have the burden of proving*...that they are socially and economically disadvantaged" (emphasis added).

Contrary to the Circuit Court's opinion, therefore, the

"the main obstacle to a finding of narrow tailoring" has *not* "disappeared." 228 F.3d at 1185. That obstacle is the proposition that the government should grant some people favors—and punish other people—on the basis of their racial heritage. Such a proposition is inherently overbroad, because it will necessarily choose some people over others without any rational connection, but merely on the basis of their race. As the district court correctly noted below, "[b]y its very nature, such a program is both underinclusive and overinclusive. This seemingly contradictory result suggests that the criteria are lacking in substance as well as reason." 965 F. Supp. at 1580. Such racial presumptions are unconstitutional, and only their total elimination can satisfy the principle of equal protection.

2. The government grant to complying general contractors is not narrowly tailored because it is given to contractors regardless of any extra cost the contractor incurs.

Although the Circuit Court accepted the Respondent's claim that the subcontracting incentive provision is no longer being applied, 228 F.3d at 1194, the provision remains on the books. *See* 48 C.F.R. 52.219-10 (b). And it remains a proper subject for this Court's consideration. *See Adarand II*, 528 U.S. at 224 ("under the circumstances of this case, it is impossible to conclude that...it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'") (*quoting United States* v. *Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)).

This regulation allows the government to determine a percentage—between zero and ten percent—of the total cost of a contracting project; that percentage will then be given to the general contractor as a bonus for "exceed[ing] its subcontracting goals"—*i.e.*, hiring a large number of minority subcontractors. As the District Court noted, this means that government grants to general contractors are actually *bonuses* granted to general contractors who comply, rather than real compensation for actual cost overruns. 965 F.

Supp., at 1579-1580. Although the text of the regulation claims that grants will be given "unless the Contracting Officer determines that the excess was not due to the Contractor's efforts," this permissive language is insufficient to remedy the problem the District Court noted. *See* 48 CFR 52.219-10(b) ("Determinations under this paragraph are unilateral decisions made solely at the discretion of the Government").

Because the amount of the bonus paid to a complying contractor is not tied to the actual amount the subcontract might cost, the result is that the incentive program "spend[s] public funds in a way 'which encourages, entrenches, subsidizes, or results in racial discrimination....' [T]he prime contractor receives addi-tional payment because of a choice based only on race." 965 F. Supp. at 1579-1580 (*quoting Lau v. Nichols*, 414 U.S. 563, 569 (1974)). Thus, even if the program was designed to remedy past discrimination by government, the incentive method of "compensation" encourages race discrimination beyond that which is necessitated by any past governmental discrimination. Such a program cannot be considered narrowly tailored. The Circuit Court claimed to be worried about government becoming a "'passive participant' in a system of racial exclusion," 228 F.3d, at 1164, but, as this case amply shows, it should have been much more worried about government engaging in *active* discrimination against particular individuals, solely on the basis of their race.

3. The government's determination of what percentage of minority contractors is "proper" is arbitrary and thus not narrowly tailored.

The Circuit Court admitted that the percentage of the racial set-aside was set arbitrarily—merely by picking a number "above the current percentage of minority-owned businesses that is substantially below the percentage of minority persons in the population as a whole." 228 F.3d at 1181. Yet the Circuit Court held that this arbitrarily chosen number was sufficient to remedy the former, arbitrarily-

chosen percentage of 12 percent. *Id.* One arbitrarily chosen figure cannot be any more or less overly broad than any other arbitrarily chosen figure. It is not for Congress to decide what percentage is the "proper" percentage of minority group members in a particular business—that decision should be made by each individual in that group *as an individual,* when he or she decides to enter that field. As explained *supra*, such statistical examinations are unreliable, unreasonable, and unconstitutional. *Croson,* 488 U.S. at 507.

4. The Circuit Court actually used intermediate scrutiny under another name.

The Circuit Court noted these shortcomings, yet that Court nevertheless upheld racial classifications in the law as being narrowly tailored to advance a compelling government interest. In doing so, the Circuit Court repeated the phrase, "strict scrutiny is not fatal in fact," like a talisman—using the phrase eleven times in its opinion. For instance, although strict scrutiny is not satisfied by a program which will punish innocent parties in the advancement of a government interest, *United States* v. *Paradise*, 480 U.S. 149, 182 (1987), the Circuit Court held that invalidating this program on such grounds "would be to render strict scrutiny effectively fatal." *Id.*, at 1183. Likewise, although the Court agreed that the 1996 subcontractor incentive program "would be more narrowly tailored had the [government] conducted an inquiry into the scope of discrimination within the region it administers as the current regulations mandate," it nevertheless held that "[r]equiring that degree of precise fit would again render strict scrutiny 'fatal in fact.'" *Id.*, at 1186. It is true that strict scrutiny is not necessarily fatal scrutiny, *see, e.g., Korematsu* v. *United States*, 324 U.S. 885 (1945), but this phrase has now become the last refuge of racial categorizations in the law. *See* R. Brad Malone, Note: Marginalizing *Adarand*: Political Inertia and the SBA 8(A) Program, 5 Tex. Wesleyan L. Rev. 275, 284 (Spring 1999) (this phrase "has been the statement around which affirmative action proponents have rallied to gather support for the proposition that federal affirmative action must survive").

By holding that a program which is not narrowly tailored nevertheless satisfies strict scrutiny, the Circuit Court has in fact *not* used strict *scrutiny* at all, but has merely called looser scrutiny by another name. It is clear that the sort of recalcitrance this Court encountered after *Brown* is going on today in defense of laws that confer benefits and punishments on the basis of race.

V. The Circuit Court's Recalcitrance in This Case Demonstrates That This Court Faces The Same Obstacles in Ending "Benign" Racism That It Faced in the *Brown* Era.

A. Racial classifications are not abandoned easily.

Unfortunately, experience has shown that racism is not overcome easily, whether it be in segregated schools or in legal classifications like this racial set-aside program. This Court spent more than two decades fighting such classifications after the *Brown I* case. *See Brown II, supra; Green, supra; Griffin, supra; Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). Yet, America has made remarkable progress. Today, Americans generally believe that race is an illegitimate factor for government classification. Across the country, Americans have rejected the notion of racial classifications, including supposedly "benign" ones. *See* C. Bolick, Blacks and Whites on Common Ground, 10 Stan. L. & Pol'y Rev 155, 158 (Spring 1999; Eastland, *supra,* at 164-165 (same). States have begun to incorporate Justice Harlan's colorblind dissent into law. *See* Cal. Const. art. I, 31, cl. A (1996) (Proposition 209); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (noting that Proposition 209 "adopt[s] the original construction of the Civil Rights Act"); ARCW § 49.60.400 (1) (Washington Initiative 200).

"[I]n a nearly unbroken line of recent decisions, federal courts in recent years consistently have struck down racial preference policies adopted by federal, state, and local

governments." C. Bolick, Jurisprudence in Wonderland: Why Judge Henderson's Decision Was Wrong, 2 Tex Rev. Law & Pol. 60 (Fall, 1997); *see, e.g., Hopwood, supra*; *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993); *Koski v. Gainer*, 1995 U.S. Dist. LEXIS 14604 (N.D. Ill. Oct. 5, 1995) (mem. op.); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Grutter v. Bollinger*, 2001 U.S. Dist. LEXIS 3256 (E.D. Mich. Mar. 1, 2001); *but see Smith* v. *Univ. of Washington Law Sch.*, 233 F.2d 1188 (9th Cir. 2000), *cert. denied*, 69 USLW 3593 (May 29, 2001).

B. The Circuit Court's opinion demonstrates the same recalcitrance the Court Faced after *Brown*.

Nevertheless, the Circuit Court's opinion makes clear that the ending of "benign" racism is going to be at least as difficult as the ending of "malign" racism in the decades after *Brown*. *See, e.g.,* 228 F.3d., at 1155 (characterizing Justice Scalia's assertion that racial classifications in the law are unconstitutional as a mere "as-piration" which will only be realized on "some future day"); *id.*, at 1157 (defending its earlier decision that case was "moot" but noting that this Court "disagreed"); *id.*, at 1167 (noting that "[w]e cannot merely recite statements made by members of Congress alleging a finding of discriminatory effects and the need to address those effects," yet doing so anyway). *See also* Malone, Marginalizing, *supra* at 299 (noting government's "effort to marginalize *Adarand*'s holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination").

California's recent experience with Proposition 209 is a foretaste of things to come. Even though that Proposition said only that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting," the Federal District Court for the Northern District of California struck down the law as a violation of the Fourteenth Amendment. *Coalition for*

Economic Equity v. *Wilson*, 946 F. Supp. 1480 (N.D. Ca. 1996). The Ninth Circuit reversed. 122 F.3d 692 (9th Cir. 1997), *cert. denied,* 522 U.S. 963 (1997). *See also Hi-Voltage Wire Works, Inc. v. City of San Jose,* 24 Cal. 4th 537 (2000) (explaining history of Prop. 209); L. A. Graglia, *"Affirmative Action," Past, Present, and Future*, 22 Ohio N.U.L. Rev. 1207, 1219 (1996) (noting "recalcitrance" in ending racial preferences); C. E. Anderson, A Current Perspective: The Erosion of Affirmative Action in University Admissions, 32 Akron L. Rev. 181, 208 n. 135 (1997) (quoting school official's "promise" to "ignore the *Hopwood* decision"); *see also* Statement of President Clinton, U.S. Newswire, Washington, D.C. July 19, 1995 (claiming *Adarand III* "actually reaffirmed the need for affirmative action").

C. The Time To End Racial Categorizations in The Law Is *Now*.

"It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans,* 517 U.S. 620 (1996). Randy Pech asks only a fair chance to compete for government contracts. Now, as this Court faces increasing recalcitrance against eliminating legal classifications in the law, it must speak with the same language it used in the post-*Brown II* cases. "[T]he vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II,* 349 U.S. at 300.

In the marble above the grand entrance to this court are chiseled the words, "Equal Justice Under Law." The Court should ratify this principle by holding that legally dividing Americans by race is unconstitutional under any

circumstances. It should embrace the doctrine of complete racial equality, and stand "for what is best in the American dream and for the most sacred values in our Judaeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence." Martin Luther King, Letter from Birmingham Jail, *reprinted in* M. L. King, Why We Can't Wait 99 (1964).

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit should be *reversed* and the district court's grant of summary judgment for Petitioner reinstated.

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DATED: June 11, 2001